S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PHILLIP D. FORNER,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY,

Appellees.

UNPUBLISHED
February 19, 2008

No. 270941
MPSC
LC No. 00-014329

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Appellant Phillip D. Forner, acting *in propria persona*, claims an appeal from an order entered on February 9, 2006, by appellee Michigan Public Service Commission ("PSC") finding that: the use of appellee Consumers Energy Company's ("Consumers") billing system by an unregulated affiliate creates a subsidy in the amount of $0.1040 per unit; Consumers has the authority to ensure that its unregulated services are charged the full amount of any subsidy provided; and any subsidy would be accounted for in Consumers' next general rate case. We affirm.

I. Background

On June 5, 2000, 2000 PA 141, the Customer Choice and Electricity Reliability Act (CCERA), MCL 460.10 *et seq*., became effective. The Legislature enacted the CCERA as part of its decision to deregulate the electric utility industry in Michigan. *Attorney Gen v Public Service Comm*, 249 Mich App 424, 426; 642 NW2d 691 (2002). The CCERA required the PSC to take various actions, including establishing a code of conduct applicable to all electric utilities. MCL 460.10a(4) provided:

> Within 180 days after the effective date of the mandatory act that added this section, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities. The code of conduct established under this subsection shall also be applicable to electric

> utilities and alternative electric suppliers consistent with section 10, this section, and sections 10b through 10bb.

The PSC established a code of conduct in orders entered in Docket No. U-12134.[1]

Section III.C of the code of conduct establishes the method to be used to determine the compensation to be paid to the utility by an affiliate when the affiliate receives services from the utility, and vice versa. Section III.C provides:

> If an electric utility or alternative electric supplier offering regulated service in Michigan provides services, products, or property to any affiliate or other entity within the corporate structure, compensation shall be based on the higher of fully allocated embedded cost or market price. If an affiliate or other entity within the corporate structure provides services, products, or property to an electric utility or alternative electric supplier offering regulated service in Michigan, compensation for services and supplier shall be at the lower of market price or 10% over fully allocated embedded cost and transfers of assets shall be based upon the lower of fully allocated embedded cost or market price.

In 2001, appellant filed a complaint alleging that Consumers violated certain sections of the code of conduct by advertising its appliance service plan ("ASP")[2] to its customers by placing inserts in its monthly bill envelopes. In an order entered on February 20, 2003, in Case No. U-13089,[3] the PSC found that Consumers violated the code of conduct, and ordered Consumers to determine the cost of access to its billing machinery and envelopes, how those costs should be accounted for, and how the costs would be charged to unregulated affiliates. The PSC stated:

> The Commission is persuaded that Consumers' unregulated businesses are unquestionably benefited when they are permitted cost-free access to Consumers' billing machinery and envelopes. The Commission finds that this situation should be obviated by requiring the unregulated programs to bear their appropriate share of the expenses to their access to Consumers' billing machinery and envelopes. Accordingly, the Commission directs Consumers to determine what those costs are, how they should be accounted for, and how they will be charged to unregulated businesses in a manner that is appropriate in light of Section 10a(4) of the code of conduct.

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[1] In 2004 PA 88, the Legislature ratified the code of conduct. See MCL 460.10a(5).

[2] This program provides appliance repair services to residential customers for a fee.

[3] Consumers claimed an appeal from this decision (Docket No. 249319). The appeal was dismissed pursuant to a stipulated order.

In an order entered on September 21, 2004, in Case No. U-13948,[4] the PSC ordered Consumers to make the cost determination within 30 days, and to "file a proceeding seeking approval of the accounting and ratemaking authority necessary to ensure that its unregulated services are charged for the full amount of the subsidy."

II. Underlying Proceedings in the Instant Case

On October 26, 2004, Consumers filed an application and billing cost study in the instant case. Consumers calculated that the fully allocated embedded cost for access to its billing system is $0.0610 per unit, excluding postage. Consumers did not include the cost of postage for the reason that the weight of its mailings is controlled, so that the inclusion of material from an unregulated program would be prohibited if it would increase the cost of postage. Consumers did not calculate the market price for access to its billing system. Appellant, a provider of heating and air conditioning services in Ottawa County, was granted intervenor status.[5]

The PSC issued its order on February 9, 2006. Initially, the PSC found that although MCL 460.10a(4) required the Commission to establish a code of conduct that would apply to every electric utility and alternative electric supplier operating in Michigan, and that although Consumers' ASP program is part of the utility's gas division, previous cases had made clear that the ASP is subject to the code of conduct.

The PSC found that Section III.C of the code of conduct requires that a utility that performs a service for an affiliate be compensated at the higher of the fully allocated embedded cost or the market price of the service. The PSC adopted appellant's estimate of $0.1040 per unit as the market price for the use of Consumers' billing system by its ASP program.

The PSC also concluded that postage costs, calculated by Consumers to be $0.2809 per unit, should not be included in the estimate of the cost of mailing services provided by Consumers to an affiliate. The PSC reasoned that if the affiliate is required to bear the cost of postage for both the utility's regular billing and the advertising insert, the affiliate would be providing a subsidy to the utility. Section III.C of the code of conduct requires an affiliate that provides a service to a utility to be compensated at the lower of the market price or the fully allocated embedded cost plus 10%. The PSC noted that because the weight of Consumers' mailings is controlled so that the addition of inserts from an unregulated program does not increase the cost of postage, the fully allocated embedded cost of postage for an insert would be zero.

Finally, the PSC concluded that it would not adjust Consumers' rates immediately upon completion of the proceedings. The purpose of the proceedings was to determine the amount of

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[4] Appellant filed this case on October 31, 2003, alleging that Consumers violated the code of conduct by enclosing with customers' December 2002, electric bills a newsletter that included an advertisement for its ASP.

[5] Appellant indicates that he sought and was granted intervenor status as an individual, and not as the owner of a business against which Consumers' ASP competed.

the subsidy provided by Consumers for the use of its billing service, and to determine whether Consumers had the accounting and ratemaking authority to ensure that its affiliates were charged for the subsidy. The PSC determined that any subsidy provided by Consumers should be accounted for in Consumers' next general rate case.

III. Analysis

The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney Gen v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

We give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney Gen v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). We give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer, *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998), but we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989). We do not afford the same measure of deference to an agency's initial interpretation of new legislation as it does to a longstanding interpretation. *In re Procedure & Format for Filing Tariffs Under the Michigan Telecommunications Act*, 210 Mich App 533, 538; 534 NW2d 194 (1995). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

On appeal, appellant argues that the PSC's order is unlawful and unreasonable. The code of conduct was intended to prevent a regulated utility from subsidizing and otherwise giving preferential treatment to its unregulated affiliates. MCL 460.10a(4). The PSC found in a previous case that Consumers' electric customers pay for the cost of Consumers' billing equipment, including the cost of postage to mail bills, and that the code of conduct is violated if an affiliated program benefits from the cost-free use of that equipment. Appellant asserts that the PSC's decision in this case that Consumers' ASP program need not pay the cost of postage when its advertising is included in Consumers' regular mailings is arbitrary and capricious. No evidence supports the PSC's finding that the ASP program would provide a subsidy to Consumers if it paid the cost of postage when its advertising is included in Consumers' regular mailings. Appellant contends that the PSC's failure to require that Consumers charge its ASP program for the cost of postage allows Consumers to give the ASP program preferential treatment, contrary to the code of conduct. We disagree.

The PSC's determination that Consumers' ASP program should not be charged for postage because the postage subsidy created when Consumers includes an ASP program advertising insert in its regular billing envelopes is zero is a rational exercise of Consumers' ability to set rates, is not arbitrary and capricious, and is not inconsistent with other decisions. Contrary to appellant's assertions, in no previous decision did the PSC determine that including ASP program inserts in Consumers' regular billings increases the cost of postage for those billings. In the instant case, which was the first proceeding in which the amount of the subsidy given by Consumers to the ASP program was calculated, the PSC determined that because the inclusion of advertising material from the ASP program does not increase the cost of Consumers' postage, to require the ASP program to pay postage costs would in effect violate Section III.C of the code of conduct by giving Consumers a subsidy. The PSC's application of the code of conduct is entitled to deference, *Champion's Auto Ferry*, *supra*, and its finding that the inclusion of an advertising insert from the ASP program does not increase Consumers' postage costs is supported by the requisite evidence, i.e., testimony from Consumers' witness.

Appellant's argument that Consumers, by not charging its ASP program for the cost of postage when an ASP insert is included in Consumers' monthly mailings, violates MCL 460.10a(4) by providing a subsidy to the ASP program by relieving it of the requirement to pay postage to distribute its advertising, is plausible. However, a party does not carry its burden of demonstrating by clear and convincing evidence that the PSC's interpretation of a statute is unlawful or unreasonable merely by showing that another interpretation is plausible. *In re Michigan Cable Telecommunications Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 900 (2000). We defer to the PSC's determination that, because the weight of Consumers' mailings is controlled to prevent insertions from unregulated entities from increasing the cost of postage, Consumers' ASP program does not receive a subsidy when its advertising insert is included with Consumers' monthly mailings, and thus no charge for postage is warranted under the code of conduct. *Public Service Comm No 2*, *supra* at 88. The PSC's order is not unlawful or unreasonable in this regard. MCL 462.26(8).

Finally, appellant argues that the PSC abused its discretion by determining that the compensation owed to Consumers by Consumers' ASP program should be accounted for in Consumers' next general rate case. Appellants assert that this decision indefinitely delays the reduction of base rates, and thus is inconsistent with one purpose of the CCERA, i.e., to improve opportunities for economic development in Michigan. MCL 460.10(2)(e).[6] Moreover, appellant contends that the PSC's decision does not take into consideration the adverse impact that relieving Consumers' ASP program of the obligation to compensate Consumers for some period of time would have on the ASP program's competitors. We disagree.

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[6] Subsection 2 of MCL 460.10 is no longer applicable. See MCL 460.10(3).

The PSC noted in its order that, "the purpose of this proceeding was to determine the amount of subsidy per unit for the use of Consumers' billing service by its unregulated affiliate and to determine whether Consumers has the requisite accounting and ratemaking authority to ensure that its unregulated services are charged the full amount of the subsidy." Consumers' application indicates that Consumers anticipated that any rate change necessitated by the proceeding would be accomplished in a general rate case. Furthermore, the notice of hearing published by the PSC does not indicate that Consumers was seeking an immediate rate change.

The PSC has broad authority to set just and reasonable rates, *Attorney Gen v Public Service Comm*, 231 Mich App 76, 79; 585 NW2d 310 (1998), and is not bound by any particular ratemaking authority. *Attorney Gen v Public Service Comm*, 189 Mich App 138, 147; 472 NW2d 53 (1991). The PSC's practice is to adjust rates in the context of a general rate case. Consumers files general rate cases on a regular basis; thus, the collection of the subsidy will not be delayed indefinitely. Furthermore, the PSC will be in a better position to determine the impact of the subsidy in a general rate case, when all of Consumers' accounting records are open to examination, rather than in isolation. The PSC was not required by any statute to adjust Consumers' rates immediately, and did not abuse its discretion by declining to do so. The PSC's order is not unlawful in this regard. *In re Telecommunications Complaint*, *supra* at 427.

IV. Conclusion

The PSC's order is lawful and reasonable, and is supported by the requisite evidence.

We affirm.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Christopher M. Murray